IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL NO.17 OF 2007
IN
NOTICE OF MOTION NO.3170 OF 2006
IN
SUIT NO.2112 OF 2006

Bhagwandas Dhanji Thakkar,
Age 71 years, Occu.Retired,
Residing at Room No.230,
Chawl No.31, Kuldeep Co-op. Hsg.
Soc. Ltd. C.C.I. Colony,
Rajendra Nagar, Borivali (East)
Mumbai-400 066. ...Appellant.

Vs.

1. Vishnu Kishordas Teckchandani,
Age 43 years, Occupation Business,
address at Room No.183,
Chawl No.6, Kuldeep Co-op. Hsg.
Soc. Ltd. C.C.I. Colony,
Rajendra Nagar, Borivali (East)
Mumbai-400 066.
2. Amarraj Lalji Nanavati
(since deceased)
Age 86 years, Occ. Not known,
Presently residing at Room
No.1, 3rd Floor, Parera Building,
Vir Savarkar Road, Opp. Gowal
Wadi, Near Railway Crossing,
Virar (East), Dist. Thane. ...Respondents.

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Shri G. V. Pandya for the Appellant.
Shri Ketan Chotani i/b. Ms.Jyoti Kochrekar for Respondent No.1.

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CORAM : R. M. S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ.

March 13, 2007.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.):

The appeal before the Court arises out of an ad-interim order passed by the Learned Single Judge on 22nd November 2006, by which the Court Receiver was appointed as Receiver in respect of the suit premises, with a consequential direction to the Receiver to appoint any party as his agent, on the usual terms and conditions. Both the Plaintiff and the First Defendant were permitted to bid for the agency. The First Defendant is in appeal.

2. The suit premises consist of a tenement (Tenement No.175, Chawl No.25, situated on plot bearing C.T.S. No.588, Kuldeep Co-operative Housing Society Limited, C.C.I. Nagar, Near Rationing Office, Rajendra Nagar, Borivali (East) Mumbai-400 066) admeasuring about 1400 sq.ft. The premises originally belonged to the Second Defendant. The Plaintiff and the First Defendant entered into an agreement on 17th February 2003 with the Second Defendant by which the Second Defendant agreed to sell the premises jointly to the Plaintiff and the First Defendant at and for a

consideration of Rs.6 lakhs. An amount of Rs.2,26,100/- was paid to the owner of which Rs. 1.26 lakhs was paid by the Plaintiff and the balance by the First Defendant.

3. A dispute arose between the Plaintiff and the First Defendant on the one hand and the Second Defendant on the other. A suit was filed on the Original Side of this Court[1] by the Plaintiff and the First Defendant to these proceedings jointly for specific performance. The dispute was resolved amicably and Consent Terms were filed in the suit on 24th September 2004. The Consent Terms envisaged that the Second Defendant to the present suit would sell the premises jointly to the Plaintiff and the First Defendant to these proceedings for an aggregate consideration of Rs.9,76,100/-. An amount of Rs.4,26,100/- was stated to have been paid in pursuance thereof and it is the case of the Plaintiff that Rs.2,26,100/- came to be contributed by him, the balance of Rs.2 lakhs being paid by the First Defendant. An amount of Rs. 5.50 lakhs remained to be paid. Of that amount, Rs.50,000/- was to be paid at the time of the registration of the agreement to sell or on compliance by the Second Defendant

1 Suit No.2383 of 2004

herein, of his obligations stated in paragraphs 4, 5 and 6 of the Consent Terms. Rs.5 lakhs were to be paid within a period of 90 days of the execution of the Consent Terms. Under clause 4 of the Consent Terms, it was envisaged that an agreement to sell would be executed in favour of the Plaintiffs, as may be necessary or required by the Mumbai Housing and Area Development Authority.

4. On 7th November 2005, a letter was addressed by the Second Defendant calling upon the Plaintiff and the First Defendant to complete the transaction within a period of seven days, failing which it was stated that the Consent Terms would be treated as 'cancelled'. As already noted earlier, under the Consent Terms, the balance of the consideration was liable to be paid within 90 days thereof, that is, on or before 29th December 2005. On 21st December 2005, a letter was addressed on behalf of the Plaintiff to the Advocate appearing on behalf of the Second Defendant, in response to the letter dated 7th November 2005. The letter specifically recorded the readiness and willingness of the Plaintiff to pay the remaining balance in respect of the tenement and called for convening of a meeting for complying with the Consent Terms. The Plaintiff also addressed an Advocate's notice

dated 22nd December 2005 to the First Defendant seeking completion of the transaction jointly in so far as the Second Defendant was concerned. The Advocate for the First Defendant informed the Plaintiff by a letter dated 23rd December 2005 that the First Defendant had paid an amount of Rs.5,50,000/- to the Second Defendant upon which an agreement for sale had been executed by the Second Defendant in favour of the First Defendant. That led to the institution of the suit.

5. The Learned Single Judge, by an order dated 22nd November 2006, held that the Consent Terms clearly stipulated that the property was to be purchased both by the Plaintiff and the First Defendant as co-owners. Contrary to the Consent Terms, the First Defendant had purported to acquire the property only in his name. The Court Receiver was, in the circumstances, appointed as Receiver of the tenement. The Receiver has been directed to appoint any party as his agent on the usual terms and conditions without, however, insisting upon security.

6. At the hearing of the appeal on 2nd February 2007, parties stated before the Court that they were desirous of resolving

the dispute amicably and accordingly, the matter was directed to be placed under the caption of 'settlement' on 5th February 2007. On 6th February 2007, offers submitted by the Appellant and by the First Respondent (the First Defendant and the Plaintiff respectively) in sealed covers were placed on the record and the Court adjourned the matter to 8th February 2007 with the following observations:

> "The offers made by the appellant and Respondent No.1 in sealed covers, placed on record.
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> At the request of the parties time granted to file Consent Terms in relation to disposal of the matter by allowing the parties to bid in the auction with the offers made by the parties being considered as the base price."

On 8th February 2007, parties placed before the Court, Minutes of Order signed by the Advocates as well as by the respective parties which were to the following effect:

> "The Appellant and Respondent No.1 have mutually agreed and resolved the disputes concerning the suit tenement as under:
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> 1. The Appellant admits and confirms that the 1st Respondent has 50% right, title and interest and as such as a joint owner of the suit tenement.
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> 2. Both the Appellant and Respondent No.2 here have submitted their offers to buy the balance 50% share of the either party in the suit tenement. Such offer is submitted to the Hon'ble Court in sealed envelopes.

3. Both the parties will also be at liberty to increase the offer and have inter se bidding.

4. The highest bidder will be entitled to succeed to the absolute right, title and interest and in the ownership of the suit tenement and the unsuccessful bidder will not have any further right in the suit tenement and the same will stand extinguished and transferred to and in favour of successful bidder, without execution of any further documents.

5. Upon the finalization of the bid or the offer given by the highest bidder being accepted by this Hon'ble Court, the successful bidder would be required to return and refund the amount already contributed by such unsuccessful bidder towards the total consideration of Rs.9,76,100/- already paid (Rs.2,26,100/- in case if the Respondent No.1 is unsuccessful bidder & Rs.7,50,000/- in case if the Appellant is unsuccessful bidder). Over and above, said amount the successful bidder will pay to the unsuccessful bidder the bid amount to buy the proportionate 50% share of other party.

6. Successful bidder agrees and undertakes to this Hon'ble Court to pay to the unsuccessful bidder such amount within such time as may be prescribed by this Hon'ble Court.

7. Upon payment of the entire amount by the successful bidder, the Court Receiver High Court appointed as Court Receiver in respect of suit tenement shall stand discharged without passing accounts, subject to payment of costs, charges and expenses of the Court Receiver and the Court Receiver will hand over the possession of the suit tenement to the successful bidder.

8. Parties agree and undertake to this Hon'ble Court to comply with their part of obligations.

9. In the event of successful bidder being Appellant, the suit will stand disposed off and in the

> event of successful bidder being Respondent No.1, the suit against Appellant shall stand disposed of as settled and the Agreement executed in only in favour of Appellant shall become null and void and enforceable, however, the suit against original defendant No.2 will continue till execution of documents of title in favour of the original Plaintiff.
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> 10. In view of the settlement arrived at between the parties hereto all disputes and complaints stand settled and the Appellant agrees and undertakes to unconditionally withdraw suit filed by the Appellant and pending in the City Civil Court bearing S.C. Suit No.3908 of 2006 within 4 weeks of filing of Minutes of order."

7. This Court by its order dated 8th February 2007, directed the Prothonotary & Senior Master to conduct an auction of the premises in question by allowing the parties to bid over and above the bids which were already submitted before the Court. The auction was to be *inter se* between the Plaintiff and the First Defendant. The Court directed that the highest amount among offers already submitted by the Plaintiff and the First Defendant shall be the upset price of the auction. All these directions were issued by the Court categorically in the presence of the parties and their Advocates who had agreed to the aforesaid modalities being followed. Accordingly, a report was submitted before the Court by the Prothonotary & Senior Master on 13th February 2007. In the report, the Prothonotary & Senior Master noted that the Appellant

had bid at Rs. 8.75 lakhs, while the First Defendant had bid at Rs. 18.50 lakhs. Parties thereafter participated in the bidding before the Prothonotary & Senior Master and the highest offer of Rs.33 lakhs for the premises was furnished by the Appellant.

8. On 15th February 2007, when the appeal was thereafter placed before the Court, a statement signed by the Advocate of the Appellant was placed on the record. In the statement, it was stated that the Advocate for the Appellant "did not go through the said Minutes of Order carefully". The Appellant informed the Court that he was unable to stand by his bid and the agreed conditions contained in clause 5 of the Minutes of Order. Counsel appearing on behalf of the Appellant submitted that there was an ambiguity in the Minutes of Order and that the Appellant was not in a position to proceed further with the bid. In order to set the record straight, it would be necessary to observe that the First Defendant has filed a reply to the statement of the Appellant's Advocate and the Appellant has filed an affidavit dated 17th February 2007. In order to obviate any controversy, we have considered it appropriate to permit the parties to argue the appeal on merits so as to obviate any perception on the part of the Appellant that the Minutes of

Order which were arrived at between the parties by consent had not been properly explained to or understood by the Appellant or the Advocate. Counsel appearing on behalf of the First Respondent has also fairly stated before the Court that having regard to the facts and circumstances, the First Respondent has no objection even if the Appellant is not desirous of pursuing the bidding process any further and to the appeal being heard on merits. Accordingly, Counsel for the parties have been heard on merits.

9. On hearing the Learned Counsel, we are of the view that the Learned Single Judge was justified in passing an ad-interim order for the appointment of a Receiver. The Consent Terms that were arrived at between the Plaintiff and First Defendant in the prior proceedings, envisaged that the tenement was to be purchased jointly by the Plaintiff and the First Defendant from the Second Defendant. Under the Consent Terms, the balance of the consideration of Rs. 5.50 lakhs was to be paid on or before 29th December 2005. The Second Defendant who was the vendor, had addressed a letter dated 7th November 2005 to the purchasers calling upon them to complete the transaction. On 21st December

2005, the Advocate for the Plaintiff had addressed a letter to the Advocate for the Second Defendant expressing his readiness and willingness to pay the remaining balance. Without making any comment, it would be necessary for the Court to record that the same Advocate who was instructed by the vendor (the Second Defendant) also appeared for the First Defendant (the Appellant, who is one of the joint purchasers). The Appellant proceeded to complete the transaction, behind the back of the First Respondent-Plaintiff on 12th December 2005 and an agreement to sell in favour of the Appellant alone was executed on 16th December 2005. The Appellant has manifestly acted in breach of the solemn obligation which was cast upon the parties by the Consent Terms in the earlier suit under which the tenement was to be jointly purchased by the Appellant and the First Respondent. Significantly, there is not even a single letter on record by the Appellant-First Defendant to the First Respondent-Plaintiff calling upon him to complete the transaction and to pay his share of the balance consideration. The Learned Single Judge was in the circumstances justified in appointing a Receiver. The Appellant has unlawfully appropriated to himself exclusively property which was intended to be acquired jointly by the Appellant and the First Respondent. The Appellant

went ahead by entering into an agreement with the Second Respondent though time for the payment of the balance was available until 29th December 2005.

10. In these circumstances, there is no reason to interfere. The appeal shall stand dismissed with costs.

(R. M. S.KHANDEPARKAR, J.)

(DR.D. Y. CHANDRACHUD, J.)